THE SOURCE OF AUTHORITY TO ENGAGE IN INTERSTATE COMMERCE.

BY the federal Constitution Congress is empowered "to regulate Commerce with foreign Nations [1] and among the several States." For reasons that we shall not pause to elaborate, we assume that the word "commerce," as here used, is substantially synonymous with "transportation," including transportation of persons and property.

Neither the Commerce clause, nor any other provision of the Constitution, specifically empowers Congress to confer authority to engage in interstate commerce or transportation. Probably it is obvious, even to laymen generally, that as a rule it is unnecessary to apply to Congress, or, for that matter, to any other governmental authority, for permission to engage therein. If I desire to travel, that is, to transport my person, either afoot, or by wagon, from a point in Connecticut to a point in New York, I no more think of so applying, than if I desire to travel between points both in New York, or to engage in manufacture or sale. The same is true if I desire to transport property, as, for example, articles of food or clothing.

This fundamental right of transportation between points in different states, as well as between points in the same state, we shall find to have been in existence long before the Commerce clause or, indeed, any constitutional or statutory provision. In Hoxie *v.* N. Y., N. H. & H. R. Co.[2] it was said by Baldwin, C. J., in a well-considered opinion:

"The right to engage in commerce between the States is not a right created by or under the Constitution of the United States. It existed long before that Constitution was adopted. It was expressly guaranteed to the free inhabitants of each State by the Articles of Confederation, and impliedly guaranteed by Article 4, § 2, Const. U. S. as a privilege inherent in American citizenship."

[1] For the sake of additional clearness, this discussion does not specifically include "commerce with foreign Nations," though largely applicable thereto.

[2] 82 Conn. 352, 364 (1909).

This language seems fully justified by the authorities. It was said by Marshall, C. J., in Gibbons *v.* Ogden:[3]

"In pursuing this inquiry at the bar, it has been said, that the constitution does not confer the right of intercourse between State and State. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The Constitution found it an existing right, and gave to Congress the power to regulate it."

So too it has been said:

"Right of intercourse between State and State was a common-law privilege, and as such was fully recognized and respected before the Constitution was formed. Those who framed the instrument found it an existing right, and regarding the right as one of high national interest, they gave to Congress the power to regulate it."[4]

This right of transportation between points in different states, seems, like that of transportation between points both in the same state, or that of manufacture or sale, one independent of interference under governmental authority, whether that of Congress or of the states, as well as of interference by mere individuals. Certainly nothing can be better established, as a general rule, than that no restriction by way of prohibition or otherwise may be validly imposed under the authority of a state upon transportation between points in different states. So far, so good. But what is the basis of this rule? We submit that the doctrine seemingly established in the Supreme Court refers it to the wrong basis, that is to say, to the action (or rather inaction) of Congress, instead of to a right long antedating the existence of Congress, or indeed any of our constitutions, federal or state. Thus it has been said:

"The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the States shall be unrestricted."[5]

[3] 9 Wheat. (U. S.) 1, 211 (1824). See dissenting opinion in Bowman *v.* Chicago, etc. Ry. Co., 125 U. S. 465, 519 (1888).

[4] Clifford, J., in dissenting opinion in Gilman *v.* Philadelphia, 3 Wall. (U. S.) 713, 737 (1865).

[5] Bowman *v.* Chicago, etc. Ry. Co., 125 U. S. 465, 508 (1888).

"So long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammelled." [6]

We submit that the interjection of this needless doctrine has resulted in much confusion.

But if there were any doubt as to the sufficiency of protection given by the ancient rule above considered, the right of transportation between points in different states, seems now, like the right of transportation between points both in the state, or the right to manufacture or sell, amply guaranteed by the Fourteenth Amendment forbidding a state to deprive of "liberty or property," without due process of law.[7]

Nor has the point, though commonly ignored, been entirely overlooked by the Supreme Court. In Williams *v.* Fears,[8] where state legislation was objected to as "in conflict with the Fourteenth Amendment because it restricts the right of the citizen to move from one state to another," the court said:

"Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and *the right*, ordinarily, *of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment.*"

Here was applied the following language used in Allgeyer *v.* Louisiana,[9] where state legislation was held invalid as applied to transportation from state to state, the article in question being a letter mailed to another state:

"The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways."

It seems reasonably clear that the right of transportation between points in different states is, as a rule, guaranteed against

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[6] Leisy *v.* Hardin, 135 U. S. 100, 109 (1890).

[7] This provision is said in Munn *v.* Illinois, 94 U. S. 113, 123 (1876), to be "old as a principle of civilized government," and to be "found in Magna Charta," as well as in all or nearly all the state constitutions.

[8] 179 U. S. 270 (1900).

[9] 165 U. S. 578 (1897).

interference by Congress, by the Fifth Amendment forbidding Congress to deprive of "liberty or property" without due process of law; that is to say, even if the ancient rule we have considered be insufficient. This provision is said to forbid

"a regulation of interstate commerce, not merely affecting the mode or manner of transportation, but excluding from interstate transportation altogether certain classes of persons, or imposing conditions on such transportation as would wantonly and arbitrarily affect personal liberty." [10]

Why then the inconsistency in failing to recognize that the identical provision of the Fourteenth Amendment is equally a guaranty against interference by the states?

It will of course be borne in mind that it is only *as a general rule* that no restriction by way of prohibition or otherwise may be validly imposed under the authority of a state upon transportation between points in different states. The effect of the exercise by a state of its taxing powers calls here for only passing notice. As, notwithstanding *the general rule* that a state cannot interfere with manufacture or sale, or transportation between points both in the state, it may under certain conditions interfere therewith by way of prohibition or otherwise, so it is as to transportation between points in different states. Thus has been sustained the power of a state to prohibit the transportation of diseased cattle into the state,[11] and so as to quarantine regulations preventing the transportation of persons.[12] Similarly the power to prevent fraud or deception has been held to include power to prohibit, or, at any rate, to impose restrictions, upon such transportation;[13] and so as to the power to prohibit the sale and transportation of game, such game being a subject of common ownership.[14]

But the Supreme Court has established the rule that, under the power to regulate commerce, Congress may likewise interfere by way of prohibition or otherwise with transportation between points in different states. What are the precise limits of its power

[10] United States *v.* Delaware & H. Co., 164 Fed. 215, 231 (1908).

[11] See Asbell *v.* Kansas, 209 U. S. 251 (1908).

[12] See Compagnie Française de Navigation, etc. *v.* Louisiana State Board of Health, 186 U. S. 380, 387 (1902).

[13] See Plumley *v.* Massachusetts, 155 U. S. 461 (1894).

[14] See Silz *v.* Hesterberg, 211 U. S. 31 (1908).

in this direction remains, it seems, to be clearly defined by the court, but it seems a reasonable conclusion that it is substantially concurrent with the powers of the states. We submit that this is conceding to Congress an awkward usurpation of powers reserved to the states. Illustrations are the recognition of the power of Congress to establish quarantine regulations;[15] to prohibit the transportation of such articles as lottery tickets[16] or transportation under conditions of monopoly.[17]

But all that has thus far been said has been without reference to transportation *under conditions of special privilege.* Now the distinction between the bald right of transportation between points in different states, and the right of such transportation *under conditions of special privilege*, we regard as of vital importance, although little or no consideration has been given to it by the Supreme Court. In passing, we may observe that there seems to be no distinction in this respect between transportation between points in different states and other transactions, as, for example, manufacture or sale, or transportation between points in the same state. It is unnecessary, as a rule, to obtain special governmental authority to engage in manufacture or sale, or transportation between points in the same state; but the case is different if it is desired so to engage under conditions of special privilege, either as a corporation, or with power to exercise the right of eminent domain. Here, as in case of transportation between points in different states, such special authority is necessary, not, indeed, for the exercise of the bald right to manufacture or sell or transport, but to manufacture or sell or transport under conditions of special privilege.

The most conspicuous instance of transportation under conditions of special privilege is that of transportation by railroad. It is indeed true that, for the purpose of engaging therein, there is not necessarily and in the nature of things required the grant of any special privilege. Abstractly the right to transport from state to state by railroad seems as clear as the right to transport afoot or by wagon. But such transportation is always, or nearly

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[15] See Morgan's Steamship Co. *v.* Louisiana Board of Health, 118 U. S. 455, 464 (1886).

[16] See Champion *v.* Ames, 188 U. S. 321, 356 (1903).

[17] See Northern Securities Co. *v.* United States, 193 U. S. 197, 335 (1904).

always, carried on by corporations requiring the exercise of the power of eminent domain. Hence, speaking generally, it is necessary to obtain governmental authority for the purpose of engaging in transportation by railroad between points in different states. But this is equally true under like conditions of the right to engage in manufacture or sale, or transportation between points in the same state.

What, now, is the source of authority to engage in interstate transportation *under conditions of special privilege?* It seems to us that this important point has received insufficient consideration from the Supreme Court. It does, indeed, seem established that such authority may be derived from Congress acting under the power to regulate commerce, as in cases of the creation of a corporation to engage in transportation by railroad.[18] The doctrine of the exclusiveness of the power of Congress under the Commerce clause seems to suggest the conclusion that such authority may not be derived from the states. Yet nothing would seem better settled than the contrary. It seems never to have been seriously questioned in the Supreme Court that it is within the powers of the states to create, for instance, a corporation to engage in interstate transportation by railroad;[19] and, indeed, the vast railroad systems of this country have, for the most part, been constructed solely under state authority.

In considering the extent of the power of interference, by way of prohibition or otherwise, with interstate transportation under conditions of special privilege, we obviously have four classes of cases to deal with: (1) interference by a state, where authority is derived from a state; (2) by Congress, where it is derived from a state; (3) by a state, where authority is derived from Congress; (4) by Congress, where it is derived from Congress.

(1) Where the authority to engage in interstate transportation, under conditions of special privilege, is derived solely from a state, it should be obvious, we submit, that, so far as the Commerce

[18] See California *v.* Central Pacific R. R. Co., 127 U. S. 1 (1888); Railroad Co. *v.* Maryland, 21 Wall. (U. S.) 456, 474 (1874). The non-existence of such power seems assumed by McLean, J., in State *v.* Wheeling & Belmont Bridge Co., 18 How. (U. S.) 421, 442 (1855).

[19] It seems to have been so assumed, rather than decided, in Railroad Co. *v.* Harris, 12 Wall. (U. S.) 65 (1870), where Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 519, 588 (1839), was supposed to apply.

clause is concerned, it is within the power of the state to withdraw such authority wholly, or to prescribe the conditions under which it may be exercised. Yet the decisions of the Supreme Court do not support this view — the reason being, as it seems to us, failure to distinguish between the bald right to engage in interstate transportation, and the right so to engage under conditions of special privilege. Having reached the conclusion that in the former case it is, as a rule, beyond the power of a state to impose restrictions, the same rule was, without discrimination, applied to transportation under conditions of special privilege granted by the state itself. The seeming fallacy of this conclusion has not been altogether overlooked. It has been pertinently said:

"Certainly a state cannot be compelled to create corporations in aid of, or to facilitate, commerce between the states; but if it does create one capable of engaging in such commerce, and the corporation in fact so engages, is that an emancipation of the corporation from the control of the state?" [20]

What we regard, therefore, as a fallacy underlies the decision in Wabash, St. Louis, & Pacific Ry. Co. *v.* Illinois,[21] where, in the case of a *domestic* corporation, the regulation of rates for interstate transportation was held invalid. The same is true of Philadelphia & Southern Steamship Co. *v.* Pennsylvania,[22] a case of taxation of the gross receipts of a domestic corporation.

The same reasoning seems to us applicable to foreign corporations. Generally speaking, a state has unquestionable power to impose restrictions, even to the extent of prohibition, upon the transaction of business therein by a foreign corporation, and we submit that such reserved power should include the imposition of restrictions upon interstate transportation. But the settled rule is otherwise.

(2) We turn now to a consideration of the power of Congress to interfere with interstate transportation under conditions of special privilege, where the authority to engage therein is derived

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[20] State *v.* C. N. O. & T. P. Ry. Co., 47 Oh. St. 130 (1890). See also Railroad Co. *v.* Maryland, 21 Wall. (U. S.) 456, 471 (1874), and dissenting opinion in Wabash, St. Louis, & Pacific Ry. Co. *v.* Illinois, 118 U. S. 557, 586 (1886); also argument of counsel in State Freight Tax Case, 15 Wall. (U. S.) 232, 264 (1872).

[21] 118 U. S. 557 (1886).

[22] 122 U. S. 326 (1887).

from a state. We have already concluded that, as a rule, the right of interstate transportation is guaranteed against interference by Congress, either by the Fifth Amendment, or by the ancient rule we have considered. This statement applies, at any rate, to the bald right to engage in such transportation not under conditions of special privilege. But we have seen that it is established that the states have power to grant authority to engage therein under conditions of special privilege, for example, as a corporation. We submit that the right of transportation under these conditions is, by virtue of the Fifth Amendment or otherwise, as much beyond the power of interference by Congress as is the bald right of transportation not under conditions of privilege. In this view it is beyond the power of Congress, so far, at least, as the Commerce clause is concerned, either absolutely to prohibit such transportation, or to require the corporation to perform a condition, such as the payment of a license fee, before engaging therein. If such result be attainable at all, it must be by resort to some other provisions of the federal Constitution, as, for example, those conferring the power to tax.[23] Yet even this seems doubtful. But the contrary view that Congress has such power under the Commerce clause has been conspicuously advocated.[24] It remains for the Supreme Court to settle the point.

(3) It seems clear enough that, as a rule, it is beyond the power of a state to interfere with interstate transportation under conditions of special privilege, where the authority to engage therein is derived from Congress. Being, as we have seen, without such power even as to a corporation of its own creation, *a fortiori* is it without it as to a corporation created by Congress. Here, too, it is unnecessary to consider what power a state has over such a corporation, so far as concerns what is purely intrastate commerce or transportation.

(4) The question of the power of Congress to interfere with interstate transportation under conditions of special privilege, where the authority to engage therein is derived from Congress

[23] A suggestion of the existence of such power has sometimes been thought to be furnished by Veazie Bank *v.* Fenno, 8 Wall. (U. S.) 533 (1869), sustaining the imposition of a tax on the notes of state banks. See Hendrick, The Power to Regulate Corporations and Commerce, § 115.

[24] See in 3 Mich. L. Rev. 264 (1905) discussion by H. L. Wilgus of the recommendation by Mr. Garfield as Commissioner of Corporations.

itself, requires but little consideration. A corporation created by Congress, for the purpose of engaging therein, is doubtless, generally speaking, completely within the power of Congress, so far as concerns such transportation, though this power is subject to limitations imposed by the Fifth Amendment. Here, too, it is unnecessary to consider what power Congress has over such a corporation, so far as concerns what is purely intrastate commerce or transportation.

The statement of the rule that it is beyond the power of Congress or of the states, as the case may be, to interfere with interstate transportation under conditions of special privilege will, of course, be taken subject to the qualification already considered as applicable to transportation not under conditions of special privilege. For instance, the general rule that it is beyond the power of Congress so to interfere, where the authority is derived from a state, is subject to the qualification illustrated by the application of the Sherman Anti-Trust Act, enacted by way of giving effect to the rule of free competition, to transportation by railroad corporations created by the states.[25]

It remains to consider certain cases of transportation under conditions of special privilege, as to which there is some confusion in the decisions. Although such special privileges are ordinarily conferred on corporations, this is not necessarily the case, and, for the sake of clearness of thought, we shall assume that the cases about to be considered are those of privileges conferred, not upon corporations, but upon mere individuals.

Take first the case of a bridge constructed over a water that is a boundary between two states. So far as we are here concerned, there seems to be no distinction in kind between an interstate bridge and an interstate railroad. The difference is merely in degree; that is, the railroad is ordinarily longer than the bridge. And what has already been said as to railroads is largely applicable here. Transportation by bridge, like transportation by railroad, does not necessarily, and in the nature of things, require the grant of any special privilege, but it is commonly carried on under conditions that do require some such grant, as, perhaps, the power of eminent domain. It is established that authority to engage in

[25] See United States *v.* Trans-Missouri Freight Ass'n, 166 U. S. 290 (1897); Northern Securities Co. *v.* United States, 193 U. S. 197, 335 (1904).

such transportation may be derived from Congress,[26] and it seems a reasonable conclusion that, as in the case of railroads, it may also be derived from the states.[27] And the rules applicable in determining the extent of the power of interference, whether by Congress or by the states, seem substantially the same as in case of transportation by railroad. Covington & Cincinnati Bridge Co. *v.* Kentucky [28] seems to go far toward justifying this view.

But the case of a ferry operated across a water that is a boundary between two states has given more difficulty. To apply what has already been said, transportation by ferry does not necessarily, and in the nature of things, require the grant of any special privilege, but it is commonly carried on under conditions that do require it. It seems a reasonable conclusion that authority to engage in such transportation may be derived from Congress, and it seems established that, as in case of railroads, it may be derived from the states.[29] It would seem to follow that the rules applicable in determining the extent of the power of interference, whether by Congress or by the states, are substantially the same as in case of transportation by railroad. And Gloucester Ferry Co. *v.* Pennsylvania [30] seems to go far toward justifying this view. But there is some confusion in the decisions on this point. Wiggins Ferry Co. *v.* East St. Louis,[31] sustaining the imposition by a municipality of a license for interstate transportation by ferry, seems rather hard to reconcile with the general doctrine of the Supreme Court on the subject. In St. Clair County *v.* Interstate Transfer Co.[32] a decision of the question whether "the respective states have the power to regulate ferries over navigable rivers constituting boundaries between states" was evaded by drawing a distinction between "a ferry in the restricted and legal signification of that term and transportation as such constituting interstate commerce." In the

[26] See Luxton *v.* North River Bridge Co., 153 U. S. 525 (1894), and argument of McLean, J., against the existence of such power, in State *v.* Wheeling & Belmont Bridge Co., 18 How. (U. S.) 421, 442 (1855); of Field, J., in Bridge Co. *v.* United States, 105 U. S. 470, 489, 495, 500 (1881).

[27] This seems to have been assumed in Gilman *v.* Philadelphia, 3 Wall. (U. S.) 713 (1865), where State *v.* Wheeling & Belmont Bridge Co., 13 How. (U. S.) 518 (1851), was explained as resting on the ground that Congress had acted upon the subject in regulating the navigation of the river.

[28] 154 U. S. 204 (1894).

[29] See Conway *v.* Taylor, 1 Black (U. S.) 603 (1861).

[30] 114 U. S. 196, 215 (1885).

[31] 107 U. S. 365 (1882).

[32] 192 U. S. 454 (1904).

absence of further declaration by the Supreme Court, there will doubtless continue to be some confusion on the subject, as is illustrated by New York Central, etc. R. Co. *v.* Freeholders of Hudson,[33] where was sustained the regulation under state authority of charges for ferriage across the Hudson River between New Jersey and New York. While we regard this decision as probably wrong, according to the authorities, that is, as inconsistent with Wabash, St. Louis, & Pacific Ry. Co. *v.* Illinois,[34] and other decisions of that character, we also regard it as sound in principle. This statement will be understood by a reference to what we have already said as to the power of interference by a state with interstate transportation under conditions of special privilege.

To summarize: — the fundamental right of transportation between points in different states is not derived from the Commerce clause, having been in existence long before the Commerce clause, and is one not merely against interference by individuals, but against interference under governmental authority, whether that of Congress or of the states.

But this statement applies only to the bald right of interstate transportation, as distinguished from such transportation *under conditions of special privilege.* For this purpose governmental authority is necessary. Such authority may be derived either from Congress or from the states.

There are four classes of cases of interference under governmental authority with interstate transportation under conditions of special privilege.

(1) *Interference by a state, where authority is derived from a state.* We submit that it is within the power of the state wholly to withdraw such authority, or to prescribe the conditions under which it may be exercised, but the decisions of the Supreme Court do not support this view.

(2) *Intefrerence by Congress, where authority is derived from a state.* We submit that, as a general rule, Congress has no such power, but it remains for the Supreme Court to settle the point.

(3) *Interference by a state, where authority is derived from Congress.* It seems clear that, as a general rule, a state has no such power.

(4) *Interference by Congress, where authority is derived from*

[33] 76 N. J. L. 664 (1909).

[34] 118 U. S. 557 (1886).

Congress. It seems clear that, as a general rule, Congress has such power.

The rules applicable generally to interstate transportation under conditions of special privilege seem applicable to such particular cases of transportation as those by bridge and by ferry, but there is some confusion in the decisions on this point.

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